(27,391)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 636.

EDGAR C. CALDWELL, APPELLANT,

vs.

W. E. PARKER, SHERIFF OF CALHOUN COUNTY, ALABAMA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

INDEX.

Byron & Detweiler (Inc.), Printers, Washington, D. C., January 16, 1920.

1 Transcript of the Record on Appeal in the Matter of Edgar C. Caldwell versus W. E. Parker, Sheriff of Calhoun County, Alabama.

Petition for Writ of Habeas Corpus.

Filed November 22nd, 1919. Chas. J. Allison, Clerk.

In the District Court of the United States for the Southern Division of the Northern District of Alabama.

EDGAR C. CALDWELL

vs.

W. E. PARKER, Sheriff of Calhoun County, Alabama.

To the Honorable the District Court of the United States for the Northern District of Alabama:

Your petitioner, Edgar C. Caldwell, now confined to the County Jail of Calhoun County, at the City of Anniston, State of Alabama, humbly complaining says:

I.

That he is unlawfully and unjustly detained by one W. E. Parker, as the Sheriff of Calhoun County, Alabama, and that his place of imprisonment is the said County jail of Calhoun County, Alabama; that your petitioner has been so restrained of his liberty since, to-wit: December 15th, 1918, and that the cause of such detention is the judgment or decree of the Circuit Court of Calhoun County, a certified copy of which is hereto annexed, and marked Exhibit "A" said judgment was affirmed by the Supreme Court of Alabama on to-wit: The 1st day of July, 1919, a copy of which is hereto attached, and marked "B", and that application for rehearing was 2 overruled on to-wit: The 28th day of October, 1919, a certified copy of which is hereto attached, and marked Exhibit "C" that your said petitioner is imprisoned and detained in said jail pending the execution of a death sentence imposed upon him in the Circuit Court of said County, and that the Supreme Court of Alabama in overruling petitioner's application for re-hearing has fixed the 5th day of December, 1919, as the day of his execution.

II.

Your petitioner further represents and shows unto your Honor that at the time of his arrest by the State authorities the United States of America was at War; that he was a sergeant of the 53rd

Company, 2 Development Battalion at Camp McClellan, Alabama; that he was a soldier in the Army of the United States of America, and that at the time of the commission of the alleged offense, and of the arrest and imprisonment of said petitioner, and at the time of the indictment upon which he was tried in said cause he was a soldier of the United States Army; that the United States was and still is at War; that under Articles 92 and 93 of the Articles of War the exclusive jurisdiction for the trial of a soldier for the offense of murder, the alleged offense for which petitioner was tried and convicted in the Circuit Court of Calhoun County, Alabama, was vested in the Court's Martial of the United States Army, and no State Court had or could acquire jurisdiction to try and convict a soldier in active service in the United States Army while the United States was at War for the alleged offense of murder.

III.

That by reason of the Constitution and Laws of the Government of the United States of America the State Court was without jurisdiction and without authority to indict or try or convict a soldier of the United States Army for the offense of murder, and petitioner avers that by reason of the facts herein set out the said judgment of conviction in this cause is void.

3 Wherefore, your petitioner prays that — writ of habeas corpus be issued by this Honorable Court directed to the said W. E. Parker, as Sheriff of Calhoun County, Alabama, or to the United States Marshal in and for the Northern District of Alabama, and that the matters and things herein contained be inquired of by the Court, and that your petitioner be ordered discharged from the detention and imprisonment aforesaid, or that such other relief may be granted as the facts and the law may justify in the premises.

EDGAR C. CALDWELL.

CHAS D. KLINE,
Attorney.
ERLE PETTUS,
U. S. Attorney.
RALPH W. QUINN,
Asst. U. S. Attorney,
Amicus Curiae.

THE STATE OF ALABAMA,
Calhoun County:

Edgar C. Caldwell being first duly sworn on oath deposes and says: That he is the person whose name is signed to the foregoing petition for habeas corpus; that he is familiar with the contents of said petition, and that the matters and things therein contained are true in substance and in fact.

EDGAR C. CALDWELL.

Subscribed and sworn to before me, this 21st day of November, 1919.

[SEAL.] CHAS D. CRYER,
Notary Public.

EXHIBIT "B."

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, October Term, 1918-19.

7 Div. 20.

Appeal from Calhoun Circuit Court.

EDGAR C. CALDWELL

vs.

STATE OF ALABAMA.

McCLELLAN, *J.:*

4 The appellant, Caldwell, stands convicted of murder in the first degree. The death sentence was imposed. Cecil Linton, a street car conductor, then in service, was the victim. The tragedy occurred on December 15, 1918. The appellant used a pistol, firing but two shots, one of which killed Linton and the other seriously wounded Morrison the motorman of the street car. An outline of the event will suffice for present purposes. The appellant had entered the car as a passenger; an altercation between him and conductor Linton ensued; the motorman, Morrison, went to the assistance of the conductor, and forcibly ejected appellant from the car; from without the car, on the ground, the appellant, drawing a theretofore concealed pistol, shot Linton and Morrison, they being at the time on the rear platform of the car; whereupon the appellant fled from the scene and was later, during the evening of that day, taken into custody.

On the next day, December 16, 1918,—which was during the term of the Circuit Court beginning theretofore in July, 1918, and to terminate by operation of law a few days thereafter (Gen. Acts, 1915, pp. 707-8),—the Court entered an order directing reconvention of the grand jury on December 19, 1918. This Grand Jury had been organized by the Court on September 2, 1918, with eighteen members. It had made, on September 7, 1918, a written report, wherein the Grand Jury asked "to be discharged." The indictment upon which the appellant was tried was returned by this body, fifteen appearing in obedience to the order of reconvention—on the afternoon of December 19, 1918. Fifteen persons are a sufficient number to constitute a legal grand jury, if, of course, the body is otherwise competent. With interims not important to be now defined, the Circuit Courts are assigned two consecutive terms during each calen-

dar year; and for each Term at least one grand jury, in counties of the population of Calhoun, is required to be empanelled, Gen. Acts 1915, p. 812 Sec. 13; Gen Acts 1909, p. 312 Sec. 18. The grand juries so empanelled are such "for that term of the Court," unless dissolved by order of the Court. A grand jury being a part of the Court, can only be dissolved by operation of law or order of the Court served by it.—20 Syc. p. 1333; Cleen vs. State 33 Ind. 418; In re Cannon, 11 Pac. 240. A grand jury regularly empanelled is, nothing to the contrary being shown, presumed to continue until dissolved by operation of law or order of the court. State vs. Winebrenner, 25 N. W. Rep. 146; 20 Cyc. pp. 1022-3. Since there is no record evidence by which alone may such Court action be shown, that the grand jury returning the indictment against appellant had been dissolved by order of the Court previous to its reassembly, there is no merit in the appellant's several contentions that the Indictment was preferred by a grand jury not authorized by law. The request made in the September 1918 report of the grand jury that it be discharged, is no evidence that the Court dissolved the grand jury. That request but expressed the desire of the grand jury, not the action of the Court essential to the dissolution of the Grand Jury which was empaneled to serve during the term ending subsequent to the term of the indictment against the appellant, unless dissolved by efficient order of the Court.

On January 6, 1919, an order was entered convening "a special jury session of the Circuit Court of Calhoun County." This order was made on the first day of the 1919 half year term of the Circuit Court. Gen. Acts 1915, pp. 707-8. Section 2 of the Act just cited provides "that the causes on the dockets for trial shall be called peremptorily at the times fixed by law *and at such other times* as may be fixed by order of the Circuit Judge; * * *, and the cases against prisoners shall be called as many more times as may be necessary to secure *prompt trials.*" (Italics supplied). This authorization and direction entirely justified the action of the Court in entering the order which, as appears from its terms, was designed to equip the Court with juries to serve the purpose contemplated by law as expressed in the quotation from the *second* section of the Act of 1915.

This order also recites that "all cases pending in said Court and at issue be triable at said special jury session of said Court." It is insisted for appellant that, since his case was not *at issue* on January 6, 1919, the date the order was made, his trial was premature, he being arraigned and pleading not guilty on January 10, 1919. The words "at issue" in the order did not introduce any binding limitation upon the power of the court,—consonant with the law-enjoining duty to afford "prompt trials" of prisoners,—to proceed, during the term, with the trial of any case, civil or criminal, that was *at issue* then or was later thereafter put *at issue*. The order does not provide for the trial of cases *now* (on January 6, 1919) "at issue." The power and authority of the Court to control the business of the Court,—to determine what cases

should be tried that were legally triable during the term, of which this prosecution was one, was plenary under our statutes; and, even if the words "at issue" should be read as only stipulating for the trial of cases *now* (on January 6, 1919) "at issue", the Court was empowered to disregard the effect of the stipulation and proceed to the trial of any cases on the docket that might have been triable during the term if the stipulation had not been made in the order,—a stipulation that the Court might have properly omitted. There is, hence, no merit in the contention that the petit juries, later going to constitute in part the special venire to try this appellant, were drawn and ordered summoned without authority of law. The provision of the general Act of 1909 Sec. 15 p. 311, with reference to the drawing of juries for the next term of the Court at least twenty days before the beginning of that term, and providing a remedy for the failure of the Judge to do so, is declared, by Section 29 of the Act, page 319, to be directory merely, not mandatory; and it is further provided that the time at which the jurors are drawn shall not affect the legality of the body or jurors thus brought into being.— Parris vs. State, 175 Ala. 16. With respect to the failure of the Sheriff to endorse the date of his return upon the process which authorized him to summon the regular jurors for the 7 week of the Court during which the appellant's case was set for trial will not authorize the presumption that it was prematurely made, without summoning all the jurors so drawn and listed on the process delivered to him. The return of the sheriff affirms that all the persons named on the list were served except one whose name was given. It is to be presumed, in the absence of any showing to the contrary, that the duty of the sheriff to summon the persons named on the list was efficiently discharged, and that the failure to serve the person not served was not attributable to a breach of duty on the part of the sheriff. Furthermore, it is the express provision of the jury law of 1909 (General Acts p. 320) that the failure of the sheriff to "summon any of the jurors drawn, or any juror fails or refuses to attend the trial or there is any mistake in the name of any juror drawn or summoned, none or all of these grounds shall be sufficient to quash the venire or continue the cause * * *." The court was without the exercise of its legal power in excusing the juror Ayers for cause regarded as sufficient by the Court.—Thomas case 124 Ala. 48; Plant's case, 140 Ala. 52; Acts 1909, p. 319 '20. The exception to the action of the Court in deciding, over the objection of the appellant, that the juror Stovall was qualified to serve upon the panel is not sustained by the record, it not appearing that the objection was grounded upon any fact that would have justified the Court in determining to the contrary.

The homicide was committed on December 15, 1918. The Indictment was returned by a competent grand jury on December 19, 1918. The appellant was arraigned on January 10, 1919; and his trial set for January 17, 1919. After the State had announced ready for trial the defendant, appellant moved for a continuance on the ground that the case was "placed too early for the defendant to properly prepare for trial and on the further ground that there

is a witness, a witness, a soldier, who was with defendant at the time of the shooting and who was an eye witness, whom the defendant had not yet been able to locate, but who may be at the camp here now." The Court overruled this motion for a continuance. It cannot be affirmed of the showing thus made, indicated by
8 the grounds quoted, that the Court abused, in any degree, its legal discretion with reference to the granting or refusing of continuance in cases called for trial. A further motion for a continuance of the case was made "on account of the absence of the witness Nathaniel J. Phillips." This motion was overruled; but the Court allowed the defendant to make a showing for the witness Phillips and it was admitted on the trial. Error cannot be predicated upon the action of the Court in refusing a continuance on this account. During the examination of the motorman, Morrison, who was shot at the time the conductor was killed, the State was permitted, over the objection of the appellant, to show the Jury where he was shot. This was of the res gestæ of the event under investigation and the exhibition of the place where the motorman was shot was properly permitted. The prosecution, on re-direct examination of the witness Yeargin, was permitted, over appellant's objection, to state the position in which the appellant held the pistol at the time he did the shooting. This matter involved no impropriety; and, besides, no ground of objection to the question propounded was given. Trial Courts are invested with a wide discretion in permitting examinations in rebuttal of evidence theretofore given in the cause. There is no merit in the criticisms, on this account, of the action of the Court in the premises. All questions propounded to the witnesses that were designed to fully develop the circumstances attendant upon the shooting of Linton by the appellant, including the action of the motorman, the conductor and the appellant on this occasion, were properly allowed. It is unnecessary to recite questions falling within this category, to which the appellant interposed objections, in some instances without stating any grounds.

The appellant was a soldier, in the service of the United States, at the time Linton was killed. The identity of the person who shot the conductor being at the time uncertain, it was competent for the State to adduce evidence tending to show that the
9 man who did the shooting wore a "so-called "Sharp Shooter's" medal, and that there was another mark of identification on his uniform. It was likewise competent for the prosecution to show what the appellant said, when in custody, with reference to his possession of a sharp shooter's medal and his explanation of how he had lost it in his flight. On the cross-examination of the witness Leonard the prosecution propounded a question intended to elicit the answer that the appellant followed the conductor in his movement thru the street car. The appellant objected to the question on the ground of its irrelevancy and that it called for the conclusion of the witness. The Court overruled the objection. In his answer the witness said that he did not know which one followed the other, thus disclosing that the point of the objection was averted by the answer of the witness.

Every ruling of the Court on the admission or rejection of evidence has been carefully considered; and of none of them can a finding of error predicated.

The oral charge of the Court was a full and fair statement of the law applicable to the facts presented to the Jury. At the instance of the appellant the Court gave 42 of his special requests for instructions. The Court refused 20 of appellant's special requests for instructions. A number of those refused to the defendant (appellant) were substantially covered by the oral charge of the Court and by special charges given at his instance. It is not error to refuse special requests for instructions that would state to the Jury the same proposition, substantially, that had been theretofore given. Gen. Acts, 1915, p. 815. The appellant reserved an exception to this part of the oral charge of the Court:

"The law presumes malice from the use of a deadly weapon; that is, malice may be presumed, from the use of a deadly weapon, unless the evidence which proves the killing rebuts that presumption of malice. If the killing is produced by a deadly weapon, such as a pistol, the law authorizes the jury to presume malice from the killing, unless the evidence which proves the killing shows also that it was done without mal-ce."

This expression of the Court was in accord with the long established rule prevailing in this jurisdiction. Hornsby v. State, 94 Ala. 55, 66; Mitchell v. State, 129 Ala. 23, 38. The undisputed evidence went to show that the shooting of the conductor was intentionally done with a deadly weapon. Another exception of the oral charge of the Court brings into question the following statement:

"Premeditation and deliberation here does not mean that the man slayer must ponder over the killing for a long time. It does not mean that he must sit down and reflect over it or think over it for an appreciable length of time; but it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot. If it does exist before and while he is pressing the trigger that fired the fatal shot, even if it be only for a moment or instant of time, it is the premeditation and deliberation as used as an element of murder in the first degree."

The doctrine thus announced is in entire accord with that illustrated in Daughdrill v. State, 118 Ala. 731-2; Hornsby v. State, supra, and many other decisions in that line. In its oral charge the Court instructed the jury as follows:

"If the killing was malicious even if it was done in the heat of passion, it is murder. Even if a killing is done in the sudden heat of passion excited by sufficient provocation, such as a blow, if there is malice in it, and if there is also the premeditation and deliberation as I have defined it to you, then it would be murder in the first degree."

This expression of the law was accurate and has been often approved. Smith v. State, 145 Ala. 14, 23, treating charge 7; Martin v. State 119 Ala. 1, 6; Hornsby v. State, Supra; Williams v. State, 181 Ala, 52, 58. As applied to the evidence in this case, the following excepted to excerpt from the oral charge of the Court was a

correct statement of the law under the authority of Nabors v. State, 120 Ala. 323; Holly v. State, 75 Ala. 14, viz.:

"He had no right to take the life of Cecil Linton unless a necessity to take his life existed at the time he did take it (if you believe from the evidence beyond a reasonable doubt that he
11 fired the fatal shot) or, unless there was apparent necessity to take the life of Cecil Linton. The law requires that there must have been real danger; that he must have been in danger of suffering serious bodily harm or death, or the appearance of danger must have been such as to have created or produced in the mind of a reasonable man the honest belief that there was danger to his life, or that he was about to suffer death, or serious bodily harm."

The next exception to a part of the oral charge of the Court touching the same subject in the Court's mind in the last mentioned quotation from the oral charge falls within the same established principles and was free from error. In respect of the next excepted-to statement in the oral charge, appellant's counsel insists that the doctrine established in this State and repeated to the Jury in this case did not have application in the present circumstances because the defendant was a soldier, wearing a uniform, and who was taught by the military authorities that an American soldier should never retreat. There is no merit, of course, in this effort to discriminate in such circumstances the application of the established law, in civil courts, to offenders whether they be soldiers in uniform or not. In civil Courts all offenders must be accorded the benefit of and held responsible under the same law.

No error affected the instruction of the jury thru the oral charge of the Court. It is unnecessary to repeat, seriatim, the subjects of further excepted-to excerpts from the oral charge of the Court. They have each been carefully considered; and from this consideration it is manifest that, insofar as the oral charge of the Court is concerned, the appellant was accorded a fair statement of the law applicable to his case and no admonition that would contribute to a just conclusion as between the State and the defendant was omitted or even carelessly stated.

In respect of the refused charges touching the measure of proof necessary to a verdict of conviction, the record abounds in efficient statements of it; and no error intervened because of the refusal of special requests touching the same subjects, in the brief for appellant special requests 5, 6, 10, 11, 12, 17, 19, and 20, refused to the defendant, are treated together. The defendant pressed the
12 theory that sought to avail of the principles that operate to reduce the grade of a homicide when the killing is traceable to an act done in sudden anger or the heat of blood, upon adequate provocation. In Martin v. State, 119 Ala. p. 6, it was said: "Homicide may be committed in the heat of passion suddenly aroused by a blow, and yet be done maliciously. Suddenly aroused passion and malice may co-exist, and both cause the act. When this is the case, the homicide, otherwise indefensible murder, is not reduced to manslaughter by reason of the pa[illegible]on." Hence, it is always held that requests for instruction touching this particular phase of the law of homicide must exclude the co-existence of malice with a sudden pas-

sion or heat of blood where the defendant would reduce the grade of his offense. If it is true that this Court, in Martin's case interpreted charge 20, of which charge 17, refused to this appellant, is a substantial duplicate, as excluding, by its terms, the co-existence of malice with sudden passion under which the defendant acted; but in the more recent decision in David v. State 188 Ala. pp. 59, 70 (treating refused charge 33) a different interpretation was given this character of instruction, and its refusal by the trial Court was justified. The ruling in Davis v. State was better grounded and is, hence, reaffirmed. But, in any event, if charges 17 and 20 are interpreted, as they were interpreted in the Martin case, supra, as excluding the existence of malice in the act consequent upon sudden passion,—then their substance was otherwise given to the jury by the Court. In the oral charge of the Court the evidence of defendant's good character was given adequate and accurate consideration. The appellant's request numbered 9, touching this subject was sufficiently covered by the Court in this feature of its oral charge. It has been long settled in this State that words of reproach, however grievous, are not a provocation sufficient to free a party taking life from the charge of murder, an assault being necessary in the premises. Felix's case, 18 Ala. 720.

Charge numbered 12, refused to the appellant (defendant) was faulty in several respects under the evidence in this case. It will suffice to note that it, along with others, did not exclude, in its hypothesis, the co-existence of malice with the passion the charge recites.

There is no error in the record, and the judgment of conviction must be affirmed.

Affirmed.

Anderson, C. J., Mayfield, Sayre, Somerville, Gardner, and Thomas, JJ, concur.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama.

7 Div., No. 20.

EDGAR C. CALDWELL, Appellant,

vs.

THE STATE OF ALABAMA, Appellee.

From Calhoun Circuit Court.

THE STATE OF ALABAMA,
City and County of Montgomery:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to Nine,

inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the 1st day of July, 1919.

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

EXHIBIT "C."

CALDWELL

vs.

STATE.

On Rehearing.

7 Div., 18.

October 23, 1919.

The full membership of the Court has accorded this record and the application for rehearing, with its accompanying briefs,
14 the thorough consideration the importance of the cause demands. After such scrutiny the Court remains convinced that appellant was given a fair and impartial trial in the Court below, under the law long established and repeatedly observed in this State. From the evidence it is plain that the guilt of this defendant, under an indictment legally preferred, was a question for the Jury. If he was found to be the guilty agent, the degree of his crime, whether murder in the first degree, murder in the second degree, or manslaughter in the first degree, was, under the evidence, a question for the jury, not the Court, to decide. The trial court lucidly and correctly defined these degrees of holicide under the laws of Alabama, and left to the jury the determination of the degree of holicide of which this defendant was charged to be guilty. There was evidence before the Jury, open to their acceptance, authorizing these conclusions; that the defendant, without provocation or justification abused and assaulted the conductor; that the conductor was a man inferior physically to the defendant; that this assault forced the conductor thru a glass window, injuring him; that the motorman came from the front to the rear of the car to the assistance of the conductor who was being then and there assaulted by the defendant; that the motorman had no weapon or other instrument when, on reaching the men, he struck the defendant and forcibly ejected him from the car; that neither the conductor nor the motorman left the car; that, when the defendant was on the ground opposite the entry to the rear platform, the conductor (who was killed) was then making no demonstration of any kind; that just before the shooting the motorman was standing on the car platform, facing the defendant (who was then on the ground) with his body braced and foot raised to kick the defendant if he attempted to re-enter the car; that neither the motorman nor the conductor was advancing upon or otherwise menacing

the defendant just before or when he fired the shots; and that, at this stage, the defendant drew from the breast of his clothing a pistol, theretofore concealed, and shot twice, felling both man, and killing the conductor and seriously wounding the motorman. There
15 was evidence to the contrary of that inviting the stated conclusions, but such evidence was not conclusive; would not have justified the court in declaring, as a matter of law, that defendant either was or was not, under the whole evidence, guilty of first or second degree murder or manslaughter. Under the familiar rules of law prevailing in Alabama, and the whole evidence in this record, the guilt or innocence of the defendant and, if guilty, the grade of his crime, were so obviously issues of fact to be determined by the Jury, not by the Court; that no reasonable contention could be made that the trial court erred in not withdrawing from the jury any element of these several issues or in enforcing the view that the defendant could only have been guilty of manslaughter. Whatever may be the rule in other jurisdictions, the trial court well observed the pertinent rules of law always prevailing, with respect to such matters in this State.

By the amendatory Act, approved September 22, 1915, (Gen. Acts p. 722) review may now be had on appeal of the action of trial courts in overruling a motion for new trial in a criminal case. The granting of review of this action on a motion in a criminal case,—introduced by amendment into the statute according a like right in a civil cause—subjects the review in a criminal case to the same considerations upon which this court has proceeded in like circumstances in a civil case, the rule being stated in Cobb v. Malone, 92 Ala. 630, and since repeated in numerous instances. In such circumstances, where the trial court hears the witnesses and this court is not so favored, the action of the trial — asserting the grounds that the evidence is insufficient to support the verdict or that the verdict is contrary to the evidence, will not be reversed on appeal "unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the Court that it is wrong and unjust."—Cole v. A. G. S. R. Co., 77 South, 719; Hacket v. Cash, 72 South 52; Studebaker v. Finney, 72 South 54, among others. It is clear from the evidence in the present record that this court cannot affirm that the trial court erred in overruling the motion for new trial,
16 either because of the insufficiency of the evidence to support the verdict or because the evidence only warranted a conviction of the lesser degree of homicide. It was, as indicated, open to the jury to credit that art of the evidence which, being accepted, authorized the jury to find the defendant guilty of murder in the first degree.

At the instance of the defendant the Court gave these special instructions touching "heat of passion":

"18. The Court charges the jury that if they believe from all the evidence, that the killing of the deceased was not malicious and was not premeditated, but that it was the result of the heat of passion

caused by a blow, reasonably engendered at the time of the difficulty, the defendant could not be convicted of murder in either degree."

"20. The Court charges the Jury that if they believe from the evidence that the killing in this case resulted from the heat of passion, engendered in the defendant by the blow struck him by the deceased at the time of the fatal difficulty, and that the killing resulted solely from anger or heat of passion so engendered, the defendant cannot be convicted of murder but of manslaughter, at the most."

These instructions, as well as the oral charge defining manslaughter, accorded the defendant the benefit of the long settled law of this State touching that subject. There was positive evidence, as well as circumstances, open to the Jury's acceptance over evidence to the contrary, refer-able to this feature of the case, that went to show, not only that defendant provoked the difficulty on the car and assaulted the conductor without justification or excuse, but that, from a position outside the car, in which he was not menaced in any degree, the defendant deliberatelt drew his pistol, theretofore concealed, and shot the conductor and the motorman.—Code *7086, which provides:

"When the killing in any sudden re-encounter or affray is caused by the assailant by the use of a deadly weapon, which was concealed before the commencement of the fight, his adversary having no deadly weapon drawn, such killing is murder in the second degree and may, according to the circumstances, be murder in the first degree."

17 The ground of the motion for new trial averring that the public mind was inflamed against defendant because of his race (negro), thru newspaper articles, was not at all sustained. It does not appear that any member of the jury saw or read the newspaper articles. In instructing the jury, the court correctly advised as follows:

"The defendant has a right to a fair and impartial trial; he is entitled to that and nothing short of that should be given him. You give the evidence in the case your earnest, your impartial consideration, and if he is not guilty, acquit him. No prejudice should influence you one way or the other, no prejudice against his race, no prejudice against him and sympathy for the dead man should influence your verdict or should affect you in making up your minds in this case. You are here to try it on the evidence and apply to the evidence the cold reason and the law as I have given it to you and say what is the truth about this matter, without being influenced by anything on the outside of what have actually been given you from the witness stand and by the Court.

On the other hand the State of Alabama and its citizens have rights and their rights should be respected in making up your verdict in the case. If the defendant is guilty of any degree of un-

lawful homicide, it is just as much your duty to the State of Alabama to convict him of that degree of which he is guilty as it is to acquit the defendant if he is not guilty."

No motion for a change of venue was made.

On the original hearing no consideration was given the appellant's motion to strike the matter set out in the bill of exceptions by the trial judge reciting the directions given by him when this grand jury made its report in September, 1918; this for the obvious reason that this Court concluded, wholly independently of the mentioned recital, that the grand jury had not been dissolved or discharged and that its re-convention was legally accomplished. The insistence that section 13 of the Act of 1915 (Gen. Acts p. 812 is without the title of that Act and is, hence, invalid, cannot be approved. The title of the Act comprehends the subject-matter of *13.

Other questions decided in the original opinion, and re-argued on rehearing, have been reexamined in the light of the briefs filed in support of the application for rehearing. The Court is not convinced that a mistake as to them has been made. To state abstractly what is argued in the concrete: It is further insisted that the doctrine of retreat is not applicable to a passenger on a street railway who is assaulted by the carrier's servant whose duty
18 it is to conserve and preserve the passenger's safety; the argument being that apt analogy is afforded by the rule that exempts one assaulted in his place of residence, etc., from the duty to retreat before his assailant. The analogy asserted is not good. One on his own premises is regarded as being in his place of refuge.—Lee's Case, 92 Ala. 15; Watts' Case, 177 Ala. 24. Not so with a passenger on a Carrier's line. The stated duty the carrier owes to its passenger, but that is an entirely different matter from the law's motive in requiring, in proper cases, one assailed to observe the law defined duty to retreat before he takes life or inflicts serious bodily harm. The law's motive in requiring retreat is conservative and preservative of human life. This motive is as operative on the vehicles of carriers as it is elsewhere.

A full review on rehearing discloses no error in the record. The application must be denied.

Rehearing overruled.

All the Justices concur.

EXHIBIT "A."

2304.

The STATE

vs.

EDGAR CALDWELL, Alias Edgar C. Caldwell, Alias Ernest Caldwell, Alias Earnest Caldwell.

Indictment for Murder.

This the 18th day of January, 1919, came J. B. Sanford Solicitor, who prosecutes for the State of Alabama, and also came the defendant in his own proper person and by Attorney, and the said Defendant having been duly arraigned upon said Indictment, and for his plea thereto said not guilty: Thereupon, came a jury of good and lawful men, to-wit: C. A. J. Hollingsworth and eleven others who being duly empanelled and sworn according to law upon their oaths do say: "We, the Jury, find the defendant guilty of murder in the first degree, and fix his punishment at death."

It is, therefore, considered by the Court, and it is ordered
19 and adjudged by the Court, that the said defendant is guilty of murder in the first degree.

2304.

The STATE

vs.

EDGAR CALDWELL, Alias Edgar C. Caldwell, Alias Ernest Caldwell, Alias Earnest Caldwell.

Indictment for Murder.

This the 24th day of January, 1919, came J. B. Sanford, Solicitor, who prosecutes for the State of Alabama, and also came the defendant Edgar Caldwell, alias, Edgar C. Caldwell, alias, Ernest Caldwell, alias, Earnest Caldwell, both in his own proper person and by his Attorney, and the said defendant being asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing:

It is, therefore, considered by the Court, and it is the judgment and sentence of the Court that the said Defendant, Edgar Caldwell, alias Edgar C. Caldwell, alias, Ernest Caldwell, alias, Earnest Caldwell, be hanged by the neck until he is dead, on Friday, the 28th day of February, 1919.

It is further ordered by the Court, and it is the judgment and sentence of the Court that the Sheriff of Calhoun County, Alabama,

shall on the 28th day of February, 1919, execute said sentence by taking the said defendant, Edgar Caldwell, alias, Edgar C. Caldwell, alias, Ernest Caldwell, alias Earnest Caldwell, and hanging him by the neck until he is dead.

And questions of law having been reserved by the Defendant in this case, and it being made known to the Court that the Defendant desires to take an appeal to the Supreme Court of Alabama, it is ordered by the Court that the execution of the sentence in this case be and the same is hereby suspended pending such appeal. And in open Court the defendant gives notice of an appeal to the Supreme Court of Alabama.

20 THE STATE OF ALABAMA,
Calhoun County:

Circuit Court of Said County.

I, A. H. Sheppard, Clerk of the Circuit Court, in and for said State and County, do hereby certify that the foregoing is a true and correct copy of the judgment and sentence of the said Court in the cause of the State of Alabama against Edgar Caldwell, alias, etc. as completely and fully as the same appears upon the records of said Court.

Witness my hand and the seal of the said Circuit Court on this the 21st day of November, 1919.

[SEAL.]

A. H. SHEPPARD,
Clerk of Circuit Court.

EXHIBIT "C."

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, October Term, 1919-20.

To the Clerk of the Circuit Court of Calhoun County, Greeting:

Whereas, the Record and proceeding of the Circuit Court of said County, in a certain cause lately pending in said Court, between Edgar C. Caldwell, Appellant, and The State of Alabama, Appellee, wherein by said Court at the — Term, 19—, it was considered adversely to said appellant, were brought before our Supreme Court, by appeal, pursuant to law, on behalf of said appellant.

Now, it is hereby certified, that it was thereupon considered by our Supreme Court, on the 30th day of June, 1919, that said judgment of said Circuit Court be in all things affirmed.

And it is hereby further certified that it appearing that as against the judgment of affirmance of this Court, the appellant, the said Edgar C. Caldwell, filed his seasonable application for a rehearing of the cause, and that this Court, on to-wit: October 23rd, 1919, over-

ruled and denied said ap-lication for a rehearing; and it fur-
21 ther appearing that the time fixed by the judgment and sentence of the Circuit Court for the execution of the prisoner, Edgar C. Caldwell, has expired pending this appeal, and that the time fixed by the said judgment of affirmance and sentence of the Supreme Court had expired pending said application for a rehearing.

It was by the Supreme Court, on said October 23, 1919, further considered and ordered that the Sheriff of Calhoun County, execute the judgment and sentence of the law on Friday, December 5th, 1919, by hanging the said Edgar C. Caldwell by the neck until he is dead, and that, in so doing, the said Sheriff follow the rules prescribed by the statutes.

It is also certified that it was further considered that the appellant pay the costs accruing on said appeal in this Court and in the Court below.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the 28th day of October, 1919.

ROBERT F. LIGON,
Clerk of the Supreme Court of Ala.

THE STATE OF ALABAMA,
Calhoun County:

Circuit Court of said County.

I, A. H. Sheppard, Clerk of the Circuit Court in and for said State and County, do hereby certify that the foregoing page contains a true copy of the certificate of the Clerk of the Supreme Court of the State of Alabama, in the case of Edgar C. Caldwell, appellant, against the State of Alabama, appellee, as completely and fully as the same appears on file and of record in said Circuit Court; and that said certificate was duly filed in said Circuit Court on the 31st day of October, 1919.

Witness my hand and the seal of said Circuit Court on this the 21st day pf November, 1919.

A. H. SHEPPARD,
Clerk of Circuit Court.

21½ *Decree Denying Writ of Habeas Corpus.*

Filed November 26, 1919. Chas. J. Allison, Clerk.

In the District Court of the United States for the Northern District of Alabama.

EDGAR C. CALDWELL

vs.

W. E. PARKER, Sheriff of Calhoun County, Alabama.

This cause coming on to be heard upon the application of the petitioner for the issuance of a Writ of Habeas Corpus upon the petition heretofore filed in this proceeding, and the Court being of the opinion that the Circuit Court of Calhoun County, Alabama, and the Supreme Court of Alabama, were not without jurisdiction to try the petitioner for the offense of which he was tried and convicted and sentenced in said Courts of the State of Alabama; and there being no averment in the petition that the military authorities of the United States had at any time demanded the surrender of the petitioner, and it appearing to the Court from the petition itself that the petitioner is not entitled to the Writ of Habeas Corpus prayed for:

It is ordered and adjudged that the petition be and it is hereby dismissed, and the petitioner is taxed with the costs of this proceeding, for which execution may issue.

This the 26th day of November, 1919.

W. I. GRUBB,
United States District Judge.

22 *Petition for Appeal.*

Filed November 29, 1919. Chas. J. Allison, Clerk.

In the District Court of the United States for the Northern District of Alabama.

EDGAR C. CALDWELL

vs.

W. E. PARKER, Sheriff of Calhoun County, Alabama.

The above named appellant, Edgar C. Caldwell, conceiving himself aggrieved by the judgment made and entered on the 26th day of November, A. D., 1919, by the United States District Court for the Northern District of Alabama, in the above entitled cause, does hereby appeal from said judgment in forma pauperis to the Supreme Court of the United States for the reasons specified in the assignments of error, which are filed herewith, the said District Court being of the opinion that there exists probable cause for an appeal and allowing the same, and having certified that there is probable

cause for such allowance, and said petitioner prays that this appeal may be allowed from the said judgment denying his writ of habeas corpus, and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the Supreme Court of the United States, and that such other, further proceedings may be had in the premises as may be just and proper.

CHAS. D. KLINE,
Attorney for Appellant.

ERLE PETTUS,
United States Attorney;
RALPH W. QUINN,
Assistant United States Attorney,
Appearing as Amicus Curiae.

Assignments of Error.

Filed November 29, 1919. Chas. J. Allison, Clerk.

23 In the District Court of the United States for the Northern District of Alabama.

EDGAR C. CALDWELL

vs.

W. E. PARKER, Sheriff of Calhoun County, Alabama.

Petition for Habeas Corpus.

Now comes Edgar C. Caldwell, the appellant in the above entitled cause, and avers and shows that in the record and proceedings in said cause the District Court of the United States for the Northern District of Alabama erred to the grievous injury and wrong of the appellant in said cause, and to his prejudice and against his rights, in the following particulars:

First. The said District Court of the United States erred in holding that the appellant's application and exhibits and records relating to his application for a writ of habeas corpus did not make a case wherein the said Court could properly allow the issuance of the writ of habeas corpus prayed for.

Second. The Court erred in holding that the facts stated in the petition were not sufficient to authorize the issuance of said writ.

Third. The Court erred in holding that the Circuit Court of Calhoun County, Alabama, in which appellant was tried and convicted for the offense of murder in the first degree and sentenced to be hanged, had jurisdiction to try said cause.

Fourth. The Court erred in holding that the jurisdiction of the State Courts of Alabama and that of the Courtsmartial in times of

War have concurrent jurisdiction of the offense of murder committed by soldiers while in the military service of the United States.

Fifth. The said District Court erred in holding that appellant was tried and convicted of murder by a Court of competent jurisdiction, which was the Circuit Court of Calhoun County, Alabama.

Sixth. The said District Court erred in holding that the military Court or courtmartial did not have exclusive jurisdiction to
24 try appellant for murder committed by him in Calhoun County, Alabama, while a soldier, in time of war, in the military service of the United States.

Seventh. Said District Court erred in holding that the trial and conviction of appellant in the Circuit Court of Calhoun County, Alabama, for the offense of murder, committed by him in said County, in time of War, and while he was then and there a soldier in the military service of the United States, were not void but valid.

Dated November 29, 1919.

CHAS. D. KLINE,
Petitioner's and Appellant's Counsel.

ERLE PETTUS,
United States Attorney;
RALPH W. QUINN,
Assistant United States Attorney,
Appearing as Amicus Curiæ.

Petition to Appeal in Forma Pauperis.

Filed November 29, 1919. Chas. J. Allison, Clerk.

In the District Court of the United States for the Northern District of Alabama.

EDGAR C. CALDWELL

vs.

W. E. PARKER, Sheriff of Calhoun County, Alabama.

To the Honorable W. I. Grubb, District Judge:

The above petitioner, conceiving himself aggrieved, of the judgment of this Honorable Court in refusing and denying to him the Writ of Habeas Corpus as asked and prayed in his petition filed in this Court November 22nd, 1919, which said judgment was made of record in said Court on the 26th day of November, 1919, and
25 the petitioner desiring to have reviewed the record of the proceedings in said cause by the Supreme Court of the United States, and petitioner deeming there is manifest and prejudicial error in said record, and because of his poverty he is unable to pay

the costs and expenses of said appeal, or to give security for the same, he being without property or funds, and having no relative or friends who have property and are financially able to assist him in the prosecution of said appeal, he, the said petitioner, respectfully petitions this Court for these reasons to be allowed to appeal from the aforesaid judgment against him in forma pauperis, and that the proper order be entered by this Honorable Court requiring that a transcript of the record of the proceedings in said cause be made and transmitted to and be filed in the Supreme Court of the United States, that the aforesaid judgment denying petitioner's writ may be reversed, set aside and held for naught.

EDGAR C. CALDWELL,
Petitioner.

STATE OF ALABAMA,
County of Jefferson:

Personally appeared before me, the undersigned authority Edgar C. Caldwell, who being by me duly sworn, deposes and says under oath that the matters and things alleged and set forth in the foregoing petition relating to petitioner's inability to pay costs of appeal, are true and correct as therein stated.

EDGAR C. CALDWELL.

Sworn to and subscribed before me this November 29, 1919.
[SEAL.] M. E. MAHONEY,
Notary Public.

26 *Order Allowing Appeal in Forma Pauperis and Staying Execution of Sentence.*

Filed November 29, 1919. Chas. J. Allison, Clerk.

In the District Court of the United States for the Northern District of Alabama.

EDGAR C. CALDWELL

vs.

W. E. PARKER, Sheriff of Calhoun County, Alabama.

This cause coming on to be heard upon the application of the petitioner for an appeal from the order dismissing the petition and denying the writ, accompanied by an assignment of errors, and upon the affidavit of the petitioner that he is unable to pay or secure the costs of appeal, and the Court being of opinion that there exists probable cause for an appeal, and now certifying, that there is probable cause for the allowance of an appeal:

On consideration whereof, the Court being of the opinion that the petitioner has no money to pay the costs of appeal, and is unable to procure any or to secure the costs of appeal, the appeal prayed for is allowed in forma pauperis upon presentation of the petition for ap-

peal, affidavit of petitioner and assignments of error; and it is further ordered that the Sheriff of Calhoun County, Alabama, in whose custody petitioner now is, and whose duty it is to execute the sentence imposed upon him by the Circuit Court of Calhoun County, Alabama, and affirmed by the Supreme Court of Alabama, stay the execution of said sentence pending the appeal, and that the petitioner remain in his present custody until the appeal is determined.

This the 29th day of November, 1919.

W. I. GRUBB,
United States District Judge.

27 Endorsed.

Executed by handing a copy of the within decree staying the execution of sentence of Edgar C. Caldwell, to W. E. Parker, Sheriff of Calhoun County, Alabama, this the 29th day of November, 1919.

H. A. SKEGGS,
U. S. Marshal.

Citation.

UNITED STATES OF AMERICA:

The President of the United States to W. E. Parker, Sheriff of Calhoun County, Alabama, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court.

Pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, for the Southern Division of the Northern District of Alabama, wherein Edgar C. Caldwell is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in the said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 29th day of November, in the year of our Lord One Thousand Nine Hundred and Nineteen.

W. I. GRUBB,
U. S. District Judge.

Endorsed.

I hereby accept service of the within Citation and waive any other or further service. This December 2nd, 1919.

W. E. PARKER,
Sheriff of Calhoun County, Alabama.
By NIEL P. STERNE AND
J. Q. SMITH,
Attorney General of Alabama,
Attorneys of Record for W. E. Parker, Sheriff.

THE UNITED STATES OF AMERICA,
Northern District of Alabama:

I, Chas. J. Allison, Clerk of the District Court of the United States for the Northern District of Alabama, do hereby certify that the foregoing pages numbered from one (1) to twenty-seven (27) both inclusive, is a full, true and correct transcript of the record on appeal in the matter of Edgar C. Caldwell, versus W. E. Parker, Sheriff of Calhoun County, Alabama, as fully as the same appears of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Birmingham, Alabama, on this the 11th day of December, A. D. 1919.

[Seal U. S. District Court, Nor. Dist. Ala.]

CHAS. J. ALLISON,
Clerk U. S. District Court,
Northern District of Alabama.

Endorsed on cover: File No. 27,391. N. Alabama D. C. U. S. Term No. 686. Edgar C. Caldwell, appellant, vs. W. E. Parker, Sheriff of Calhoun County, Alabama. Filed December 22d, 1919. File No. 27,391.

Supreme Court of the United States.

(October Term, 1919.)

EDGAR C. CALDWELL, *Appellant*,
v.
W. E. PARKER, *Sheriff of Calhoun County, Alabama.*
No. 636.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

MOTION OF APPELLEE TO ADVANCE.

Now comes the appellee by his counsel and respectfully moves the court to advance this case for argument on an early date of the present term convenient to the court.

The appeal in this case was taken from a judgment of the District Court of the United States for the Northern District of Alabama, November 26, 1919, denying the petition of appellant for a writ of *habeas corpus* and dismissing his petition.

Appellant's petition for writ of *habeas corpus* to the District Court of the United States for the Northern District of Alabama filed November 22, 1919, alleged in substance that appellant was unlawfully and unjustly detained by the sheriff of Calhoun County, Alabama, and by such detention had been restrained of his liberty

since December 15, 1918, the cause of said detention being a judgment or decree of the Circuit Court of Calhoun County, Alabama, which judgment was affirmed by the Supreme Court of Alabama July 1, 1919, and an application to said court for a rehearing overruled October 28, 1919; that appellant had been imprisoned and detained in jail pending the execution of a death sentence imposed for murder by the Circuit Court of Calhoun County, Alabama, and that the Supreme Court of Alabama in overruling appellant's application for a rehearing fixed December 5, 1919, as the day of his execution; that at the time of the arrest of appellant by State authorities the United States was at war with Germany and that he was a sergeant in the United States Army.

That he was a soldier in the United States Army at the time of the commission of the offense, of his arrest and imprisonment and at the time of the indictment for murder upon which he was tried; that the United States was and still is, at war and that under Articles 92 and 93 of the Articles of War that the exclusive jurisdiction of the trial of a soldier for murder in time of war, is vested in the courts martial of the United States Army and that no State court had and could have jurisdiction to try and convict of murder, a soldier in active service in time of war; that by reason of the Constitution and laws of the United States the State court was without jurisdiction and authority to indict, try or convict the appellant of murder and that the judgment against him is void.

The District Court of the United States for the Northern District of Alabama November 26, 1919, denied appellant's petition for a writ of *habeas corpus* and dismissed the same, holding that the State courts were not without jurisdiction and that there was no

averment that the military authorities had, at any time, demanded surrender of appellant. November 29, 1919, the District Court of the United States for the Northern District of Alabama allowed an appeal to this court, stayed execution of the death sentence pending such appeal and ordered that the petitioner stay in custody of appellee pending the decision of the appeal.

This is a criminal case entitled to be advanced under Section 3 of Rule 26 of the Rules of this court.

The State courts of Alabama had jurisdiction of the case, the same was tried in the proper State court, and appellant convicted there of murder. An appeal was taken to the highest court of the State and the decision of the lower court affirmed and a petition for a rehearing overruled by the Supreme Court of Alabama.

Opposing counsel have been notified.

Respectfully submitted,

BENJAMIN MICOU,
Counsel for Appellee.

December 30, 1919.

Supreme Court of the United States

October Term, 1919.

No. 636.

EDGAR C. CALDWELL, *Appellant*,

vs.

W. E. PARKER, SHERIFF OF CALHOUN COUNTY, ALABAMA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

This is an appeal from a judgment of the District Court of the United States for the Northern District of Alabama dismissing a petition of appellant (hereinafter called petitioner), for a writ of *habeas corpus*.

Petitioner was indicted December 19, 1918, in the Calhoun Circuit Court of Alabama for the crime of murder, alleged to have been committed on December 15, 1918, and on January 18, 1919, was convicted of the offense; and on January 24, 1919, he was sentenced to be hanged on February 28, 1919. On appeal, his con-

viction was affirmed by the Supreme Court of Alabama, July 1, 1919, and his application for rehearing by that Court was, on October 23, 1919, denied.

On November 22, 1919, petitioner filed in the District Court of the United States for the Southern Division of the Northern District of Alabama his petition for *habeas corpus*, setting forth as follows: That he was unlawfully and unjustly detained by the Sheriff of Calhoun County, Alabama, in the County Jail of said County, upon the judgment of his conviction in the Circuit Court of that County as aforesaid; that at the time of his arrest by the authorities of the State of Alabama the United States of America was at war; that he was a sergeant of the 53rd Company, 2nd Development Battalion, at Camp McClellan, Alabama; that at the time of the commission of his alleged offense, of his arrest and imprisonment and of his indictment as aforesaid he was a soldier in the United States Army, the United States then and still being at war; that under Articles 92 and 93 of the Articles of War the exclusive jurisdiction for the trial of a soldier for the offense of murder was vested in the courts-martial of the United States Army, and no State Court had or could acquire jurisdiction to try and convict a soldier in active service in the United States Army, while the United States was at war, for the alleged offense of murder; and that by reason of the Constitution and laws of the Government of the United States of America the said Court was without jurisdiction and without authority to indict or try or convict a soldier of the United States Army for the offense of murder, wherefore his conviction as aforesaid is void (Rec., 1-2).

Upon consideration of the petition the same was dismissed, the Court in its judgment stating that the State Court was not without jurisdiction to try the petitioner for the offense for which he was tried and convicted, and that there was no averment in the petition that the military authorities of the United States had at any time demanded the surrender of petitioner (Rec., 17). From this action of the Court the present appeal was taken (Rec. 17-18).

II.

Assignments of Error.

The errors assigned are as follows:

1. The said District Court of the United States erred in holding that the appellant's application and exhibits and records relating to his application for a writ of *habeas corpus* did not make a case wherein the said Court could properly allow the issuance of the writ of *habeas corpus* prayed for.

2. The Court erred in holding that the facts stated in the petition were not sufficient to authorize the issuance of said writ.

3. The Court erred in holding that the Circuit Court of Calhoun County, Alabama, in which appellant was tried and convicted for the offense of murder in the first degree and sentenced to be hanged, had jurisdiction to try said cause.

4. The Court erred in holding that the jurisdiction of the State Courts of Alabama and that of the courts-martial in times of war have concurrent jurisdiction of the offense of murder committed by soldiers while in the military service of the United States.

5. The said District Court erred in holding that appellant was tried and convicted of murder by a Court of competent jurisdiction, which was the Circuit Court of Calhoun County, Alabama.

6. The said District Court erred in holding that the military Court or court-martial did not have exclusive jurisdiction to try appellant for murder committed by him in Calhoun County, Alabama, while a soldier, in time of war, in the military service of the United States.

7. Said District Court erred in holding that the trial and conviction of appellant in the Circuit Court of Calhoun County, Alabama, for the offense of murder, committed by him in said County, in time of war, and while he was then and there a soldier in the military service of the United States, were not void but valid.

III.

Argument.

1. The proceeding properly instituted.

The jurisdiction of the Court which tried petitioner being directly in question, he is a proper party to raise the question and *habeas corpus* is the proper proceeding.

Coleman v. *Tenn.*, 97 U. S. 509.

2. The relation of the citizen to military duty.

Certain propositions, all or some of which have been considered debatable within the present generation, are now universally accepted as beyond the realm of discussion.

Among these may be stated the following:

The United States is—no longer "are"—a nation in all that the word imports, and within its sphere its authority is complete and supreme.

Citizenship of the United States, formerly considered secondary to State citizenship, derivative therefrom and subordinate thereto, is now primary, paramount and dominant. This national citizenship is coextensive with the territorial limits of the United States, is automatic through the fact of birth within the limits and subjection to the jurisdiction of the United States, or is acquired by naturalization, and cannot be repudiated save through actual expatriation legally effected.

The right of the nation to compel its citizens to render military service for the public defense, whether by enrolment in a regular army or by conscription for an army of emergency, is clear and unlimited. So far from being inconsistent with liberty, this right is essential to its preservation, and in order to its adequate assertion and to the power essential thereto it is inevitable that the nation must, at all times and under all conditions, have full control of its whole military strength. As against the individual himself and the State of which also he may chance to be a citizen, the right of the nation to demand his military service is indisputable, paramount and constant.

3. Authority over the citizen in military duty.

From the foregoing propositions it results that when the nation puts forth its military strength—in a word, when it is at war—its military instrumentality, its army, is immune from outside interference: the human as well as the material constituents thereof are beyond any other reach than its own.

What are thus called the human constituents of the nation's military instrumentality are none other than the nation's citizens above considered. True it is in ordinary that these have a double citizenship, state and national, subjecting them at one and the same time to each and both of the two jurisdictions, state and national. This holds always, whether the nation be at peace or at war, but the nation's being at war so affects the citizenship of the individual as for the time being to give it an unusual and important aspect.

In ordinary, the civil authority over the citizen is superior to the military. This is an accepted truism. But how stands the matter in the extraordinary case when the nation is at war and every one of its citizens called to bear his part in the war is subject to the supreme authority of the United States for its military purposes? when every such one is a constituent member of the military body which is the nation's essential instrumentality for carrying on the war?

Manifestly, in such a situation there exist two citizen bodies, two citizenries, the one civil, the other military. In this situation, the body constituting the military citizenry is as separate from that composing the civil citizenry as though the two were composed of members of different races of men—not wholly unlike the case in which two sets of nationals, differing in race, occupy side by side the same territory, each being subject however to the jurisdiction of the governing authority of his own national set.

Assuming this to be so, it follows, theoretically at least, that the respective jurisdictions over the two bodies of citizenry would, and of necessity must, be mutually exclusive. Theory aside, how stands the matter in fact?

Conceding that even in time of war civil obligations, liabilities and duties of and among citizens in ordinary remain unaffected by that event, how is it as respects those obligations, liabilities and duties to the meeting which the person of the citizen is indispensably subjectable? the liability, for instance, to bodily apprehension and detention for infraction of a penal law. To subject the individual to the liability involved, the taking and holding his body is essential; without that, the law must and would stand unenforced.

4. The law applicable in the premises.

Now for the case of the member of the army—of the national war instrumentality—so rendering himself liable, what is the law? by which authority, civil or military, is he to be taken in hand?

Obviously, the answer to this question depends ultimately upon the laws governing the army, otherwise the Articles of War, so-called. Of these the following are directly pertinent:

> Art. 74. When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, *except in time of war,* upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such

application refuses or wilfully neglects, *except in time of war*, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

Art. 92. Any person subject to military law who commits *murder* or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia *in time of peace*.

Art. 93. Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

The articles cited are from the present Articles of War enacted (39 Stat. L. 650) in amendment of Section 1342 R. S. U. S., the present Article 74 taking the place of former Article 59, and the present Articles 92 and 93 taking the places of former Articles 58 and 62 respectively.

At the October 1878 Term of this Court, there was under consideration the 30th Section of the Act of Congress of March 3, 1863, to enroll and call out the national forces, the same being as follows (12 Stat. L. 736):

> "That, in time of war, insurrection or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, rob-

bery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the Articles of War; and the punishment for such offenses shall never be less than those inflicted by the laws of the State, Territory or district in which they may have been committed."

In the case then before the Court, which was in error to the Circuit Court of the United States for the Eastern District of Tennessee on *habeas corpus*, the plaintiff in error, petitioner, was indicted in the State Court of Knox County on October 2, 1874, for a murder alleged to have been committed on March 7, 1865. To this indictment he pleaded not guilty, and a former conviction for the same offense by a general court martial regularly convened for his trial at Knoxville, Tennessee, on March 27, 1865, the plea stating that he was afterwards, and on May 9, 1865, tried and convicted by the court-martial and sentenced to death, and that said sentence was still standing as the judgment of the court-martial, approved as required by law in such cases; wherefore he prayed that the indictment be quashed. The trial court overruled the plea, petitioner was convicted by the State Court, and on his appeal his conviction was affirmed by the Supreme Court of the State.

This Court discharged petitioner from custody by the Sheriff of Knox County on the indictment and conviction for murder in the State Court, reversing the judgment of the Supreme Court of Tennessee affirming the conviction, and directing petitioner to be de-

livered up to the military authorities of the United States to be dealt with as required by law.

The Court rested its decision upon the ground that at the time of his conviction by the court-martial petitioner was a soldier of the United States; that Tennessee, the State in which the offense was committed and for which petitioner was indicted, was at the time in the military occupation of the United States as enemy's country, and that the officers and soldiers of the Army of the United States in Tennessee during the war were not subject to the laws nor amenable to the tribunals of the hostile country. This was all that was necessary to dispose of the case, but the Court in its opinion, clearly by way of *obiter dictum*, said that the section in question did not make the jurisdiction of the military tribunals exclusive of that of the State Courts.

Coleman v. *Tenn.*, 97 U. S. 509.

The decision in this case was followed by the District Court of the United States in Tennessee.

Tenn. v. *Hibdom*, 23 Fed. Rep. 795.

And in the case of *Exp. King*, 246 Fed. Rep. 868, presently to be more particularly noted, the opinion of this Court in the *Coleman* case is critically and lucidly considered in the light of the Articles of War as now existing, and as to be differentiated from those Articles as formerly existing, and from the Section of the Enrolment Act of March 3, 1863, above cited. Before considering the last-mentioned case, it is not amiss to ask attention to certain judicial expressions, the direct bearing of which upon the main question involved would seem apparent.

Thus, it is well said by the Supreme Court of Connecticut, speaking of the obligation of the citizen to military service, "The obligation to serve and the right to require service exist and are paramount."

Lanahan v. *Birge*, 30 Conn. 438, 444.

And, again, it is said by the Supreme Court of Appeals of Virginia, in an unusually well-considered case arising in that State during the Civil War and under the Constitution of the Confederate States, the provisions of which respecting the power to raise and support armies and to provide for the government and regulation of the same are identical with those of the Constitution of the United States:

> "The power of coercing the citizen to render military service is indeed a transcendent power in the hands of any government, but so far from being inconsistent with liberty it is essential to its preservation. A nation cannot foresee the dangers to which it may be exposed; it must therefore grant to its government a power equal to every possible emergency; and this can only be done by giving to it the control of its whole military strength . . [The authority in this behalf] ought to be placed in the hands of the one which is charged with the duty of providing for the defense of the country; for a government 'from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.' "

Burroughs v. *Peyton*, 16 Gratt. (1864) 470, 473-4.

"An army is a body of men whose business is war. . . It is well known that a regular army

would be absolutely indispensable in a protracted contest with a powerful nation."

Id., p. 475.

"The exigencies of the country may demand the whole military strength that has been placed at its disposal. As the nature and extent of these exigencies cannot be foreseen, and it is impossible to say in advance that the services of *every* citizen capable of bearing arms may not become indispensable for the defense of the country, the government has no right to enter into any contract precluding itself from requiring those services if they should be needed."

Id., p. 488.

It was in that case accordingly held that the Confederate Congress had the Constitutional power to pass an act putting an end to the exemption of those who had theretofore furnished substitutes for their military service.

Respecting the contemporaneous existence within the same territorial limits of separate and distinct jurisdictions, this Court in a very familiar case has spoken in language which, though perhaps not immediately applicable to the distinction between the civil and the military jurisdictions, is yet sufficiently pertinent to justify quotation.

In that case the Supreme Court of Wisconsin, affirming the decision of one of its associate justices, discharged from imprisonment the defendant in error who had been arrested under the Fugitive Slave Law. In reversing the State Court, this Court, speaking by Chief Justice Taney, said:

> "And although the State of Wisconsin is sovereign within its territorial limits to certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offense against the laws of the State in which he was imprisoned."
>
> *Ableman* v. *Booth*, 21 How. 506, 516.

And in the same opinion (p. 523), the Court again adverts to

> "the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other."

As above premised, these expressions of the Court in that case are applied to the two distinct jurisdictions, state and national, within the same territorial space, and while, as stated, they are not strictly applicable, they are yet pertinent, in considering the existence within the same territorial space of the two

separate jurisdictions, civil and military, over the same subject, namely, the citizen. This will be recurred to hereinafter.

Reverting now to the Articles of War above cited, as has been remarked, the present article 74 takes the place of former Article 59 (R. S. U. S., Sec. 1342, p. 235), and for present purposes the difference in verbiage of the two is, in the main, negligible. Former Article 59 provided that whenever any officer or soldier was accused of any crime therein mentioned punishable by the laws of the land, the officers of his command were required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavor to deliver him over to the civil magistrates and to aid the officers of justice in apprehending him and securing him in order to bring him to trial, under penalty of dismissal from the service in case of refusal or wilful neglect, except in time of war, to deliver over such accused person to the civil magistrates.

The present Article 74 excepts from persons thus directed to be delivered over to the civil authorities "one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles," namely, the Articles of War, and changes the penalty to dismissal from the service, or such other punishment as a court-martial may direct.

Also, as observed, the present Articles 92 and 93 take the place of former Articles 58 and 62.

Former Article 58 (R. S. U. S., Sec. 1342, p. 235) provided that in time of war the crimes therein mentioned, including murder, should be "punishable" by

the sentence of a general court-martial when committed by persons in the military service of the United States, and that the punishment in any such case should not be less than the punishment provided for the like offense by the laws of the state, territory or district in which such offense might have been committed. In passing, attention should be arrested by the expression "*shall be punishable,*" in this Article, as emphasis upon the same language was laid by this Court in the case of *Coleman* v. *Tenn., supra.*

The present Article 92 provides that any person subject to military law who commits the crimes therein mentioned, including murder, "shall suffer death or imprisonment for life, as a court-martial may direct," with the proviso that no person shall be tried by court-martial for any such crime "committed within the geographical limits of the States of the Union and the District of Columbia *in time of peace.*"

Former Article 62 (R. S. U. S., Sec. 1342, p. 236) provided that all crimes not capital and all disorders and neglects of which officers or soldiers might be guilty, to the prejudice of good order and military discipline, though not mentioned in the Articles of War, were "to be taken cognizance of" by a court-martial, according to the nature and degree of the offense and punished at the discretion of such court.

Present Article 93 provides that any person subject to military law who commits any of the crimes therein mentioned, none of which is capital, "shall be punished as a court-martial may direct."

Comparing now former Article 58 with present Article 92, it is first particularly to be noted that, whereas the former used the expression that the *offense* therein mentioned "shall be punishable" (of which language as used in the Enrolment Act of March 3, 1863, this

Court in the *Coleman* case remarked: "It simply declares that the offenses shall be 'punishable', not that they shall be punished by the military courts; and this is merely saying that they may be thus punished") the present Article 92 distinctly provides "that any *person* subject to military law who commits" either crime in the Article mentioned, of which murder is one, "*shall suffer* death or imprisonment for life, *as a court-martial may direct.*"

The difference in language between the two sections, old and new, cannot be regarded as accidental and must be regarded as industrious. The former Article declared that the *offenses* mentioned should be "punishable", the present Article provides that the guilty *person* shall suffer either death or imprisonment for life, "as a court-martial may direct;" and as Congress is to be presumed to have had in mind the language of this Court in the *Coleman* case, the conclusion is inevitable that, as stated, the use of the different language in the present Article 92 was industrious, and accordingly that in enacting the new Article Congress intended, instead of providing that the offenses mentioned should be "punishable", the offender himself in each instance should suffer the prescribed penalty, to be inflicted by the designated tribunal, namely, a court-martial.

As respects the question whether there is any difference in the applicability of the Articles under consideration in time of peace and in time of war, the language of the Articles as above cited would appear conclusive that in time of war the soldier committing the murder is subject exclusively to the jurisdiction of the military tribunal. The briefest consideration of these Articles would seem to make this clear.

By Article 74 it is required of the commanding officer, and of him only, upon application of the civil authorities, and upon such application only, to deliver to the latter, or to aid in apprehending or securing for the latter, for trial, a soldier accused of crime, except one who is at the time held by the military authorities as prescribed, and also, *"except in time of war;"* and the penalty incurrable by the commanding officer who upon such application refuses or wilfully neglects to do as required is to be visited upon him only *in time of peace.*

Again, whereas Article 92 provides that a soldier committing murder shall suffer the prescribed penalty by sentence of a court-martial, it further provides that no soldier accused of such offense shall be tried by that tribunal if the offense be committed *"in time of peace."*

If, therefore, these Articles are so to be read as to give effect to each and all of their provisions, as is the canon of statutory construction, it necessarily follows that the Articles mean this: that in time of peace a soldier charged with murder must be tried by the civil authorities and cannot be tried by the military, but that in time of war the military authority over the soldier is primary, paramount and exclusive.

From another viewpoint this conclusion seems equally unavoidable.

As above indicated, the citizen—by which is meant *every* citizen—is under obligation to national military service, and the right of the nation to require such service is paramount; the army of which the citizen becomes a member is a body of men whose business is war, and what is more, the body which the nation has formed and is using as its instrumentality to carry on

war; and so impossible is it to say that the services of *every* citizen capable of bearing arms may not become indispensable for the defense of the country, that it follows as a corollary that *every* citizen must be kept in a situation and condition to render those services at any and every moment of his time.

When, therefore, the citizen becomes a member of the army in time of war, he is, for the time being and for the purposes of the services due by and required of him, withdrawn from civil life and transferred to a separate and distinct realm, namely, the realm of military life.

To repeat, he ceases for the time being to be of the civil citizenry and becomes a member of the military citizenry, and is subject accordingly to the laws and regulations governing the latter and not to those governing the former: all this, of course, during a state of war. And if this be so, no civil authority may for the time being lay hand upon him because of any act for which, except for his temporary condition, he would have been amenable to the civil law and its authorities.

Certain of the adjudged cases as bearing upon the questions herein involved may briefly be noticed.

As already remarked, the language of this Court in the *Coleman* case respecting the exclusiveness, or the contrary, of the jurisdiction of the military tribunal under the section of the Enrolment Act under consideration is plainly *obiter dictum*, and should therefore not be, and is not, controlling.

The cases of *Exp. Mason*, 105 U. S. 696, *Grafton* v. *United States*, 206 U. S. 333, and *Franklin* v. *United States*, 216 U. S. 559, upon which doubtless reliance will be had for the respondent, are all cases which

arose in time of peace, and under the *former*, and not the *present*, Articles of War; and the language of the Court in each of those cases is to be restricted in application accordingly.

In the judgment now under review (Rec., 17), as above remarked, it is recited that there is no averment in the petition that the military authorities of the United States had at any time demanded the surrender of the petitioner.

Of this it ought to suffice to say that the jurisdiction of the military authorities in no sense and to no extent depends upon the action of any one of those authorities in putting that jurisdiction into exercise—not meaning, of course, that the jurisdiction cannot be exercised without being started, but meaning that the failure or omission on the part of one having opportunity so to do to put the jurisdiction in play cannot be said to cancel or abrogate it: because one amenable to a tribunal is not brought before the tribunal neither cancels his offense nor abolishes the tribunal.

Nor would the case be affected if the fact were that any one in military authority had delivered the petitioner to the civil authorities for trial: as respects this, it suffices to say that no one in military authority has any right so to do; that no one but the commanding officer is charged with the duty of delivering an accused soldier to the civil authorities, and that in time of war that obligation is not even on him.

It results accordingly that any action or inaction upon the part of the military authorities in the premises assumed has not the slightest bearing upon the question of the existence of the jurisdiction contended for; and for the reasons stated that jurisdiction is exclusive.

It remains only to invite the Court's attention to the full, careful and luminous opinion of Cochran, District Judge, in the case of *Exp. King*, 246 Fed. Rep. 868, in which are carefully considered the Articles of War above cited, the question of the exclusiveness of the military jurisdiction as affected by the language of this Court in the *Coleman* case, the difference in application of the Articles of War to a time of peace and to a time of war, and the assumed possible waiver by the military authorities of the jurisdiction conferred and intended to be conferred upon them.

For the reasons given, the judgment of the Court below dismissing the petition should be reversed and the cause should be remanded with direction to discharge the petitioner.

Respectfully submitted,

HENRY E. DAVIS,
JAMES A. COBB,
Attorneys for Appellant.

CHARLES D. KLINE,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 636.

EDGAR C. CALDWELL, Appellant,

vs.

W. E. PARKER, SHERIFF OF CALHOUN COUNTY, ALABAMA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

Brief and Argument of

J. Q. SMITH, Attorney General of Alabama,
NIEL P. STERNE, and
BENJAMIN MICOU,
Counsel for Appellee.

STATEMENT OF THE CASE.

We are compelled to prepare this brief without having seen appellant's brief, and, for that reason, we set out briefly a statement of the case.

On December 15th, 1918, appellant, Edgar C. Caldwell, killed one George R. Linton, a civilian, in

Calhoun County, Alabama. (Record page 3.) At that time appellant was a soldier in the army of the United States. For this offense appellant was indicted by a grand jury in the Circuit Court of Calhoun County, Alabama. He was tried in that court, found guilty of murder in the first degree, and sentenced to be hanged. From this judgment he appealed to the Supreme Court of Alabama. The judgment of the lower court was affirmed. Caldwell then applied for a rehearing in the Supreme Court. This application was overruled; and the Supreme Court of Alabama sentenced him to be hanged on December 5th, 1919.

On November 22nd, 1919, Caldwell filed a petition for a writ of *habeas corpus* in the District Court of the United States for the Eastern Division of the Northern District of Alabama. The sole ground assigned was the contention that in time of war jurisdiction of offenses committed by soldiers vests in courts-martial to the exclusion of civil tribunals, and, therefore, that the proceedings and judgments of the state courts were void. There was no allegation that the offense was committed in the performance of any military duty or in any place under the exclusive jurisdiction of the United States. There was no averment that the military authorities had at any time demanded the surrender of the petitioner; nor was there any allegation that the military authorities had not delivered petitioner to the civil authorities for trial. It appears from the record that this objection to the jurisdiction of the state courts was made for the first time by the filing of the petition for a writ of *habeas corpus*. The District Court dismissed the petition and an appeal was taken to this court.

PROPOSITIONS.

I.

Offenses committed by soldiers are crimes against both the state and the army, and the tribunals of each possess concurrent jurisdiction to try and punish the offender.

Coleman vs. Tennessee, 97 U. S., 509;
Franklin vs. U. S., 216 U. S., 559;
U. S. vs. Clark, 31 Fed., 710.

II.

The present Articles of War do not deprive civil tribunals of jurisdiction over offenses committed by soldiers.

Franklin vs. U. S., supra;
Ex parte Mason, 105 U. S. 696;
Grafton vs. U. S., 206 U. S., 333;
People vs. Denman, 177 Pac. 461;
Funk vs. State, 208 S. W. 509;
U. S. vs. Hirsch, 254 Fed. 109.

BRIEF AND ARGUMENT.

There is no dispute in the authorities of the general doctrine that civil tribunals have concurrent jurisdiction with courts-martial over crimes committed by sol-

diers. The rule is thus laid down in Tyler on Military Law, quoted by Mr. Justice Brown (then on the district bench) in *United States vs. Clark*, (31 Federal, 710):

> "The martial or military law, as contained in the mutiny act and articles of war, does in no respect supersede or interfere with the civil or municipal laws of the realm. * * * Soldiers are, equally with all other classes of citizens, bound to the same strict observance of the laws of the country, and the fulfillment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country for all offenses against those laws, and breaches of those duties."

This court has several times held this to be the law. As we understand, appellant does not dispute the correctness of this principle, but contends that this rule of law, as previously declared by this court, has now been done away with by reason of a change in the phraseology of the Articles of War as revised in 1913, (Act March 2nd, 1913, c. 93, 37 Stat. 721) and 1916 (Act August 29th, 1916, c. 418, 39 Stat. 619; U. S. Comp. St. Sec. 2308a). The changes relied upon consist of the use of the expressions "shall be punished as a court martial may direct" (Article 93), and "shall suffer death or imprisonment for life as a court-martial may direct" (Article 92), as compared with the expression "shall be punishable" in old Article 58 (12 Stat. 736), which latter statute was construed in *Coleman vs. Tennessee*, (97 U. S. 509.) Mr. Justice Field, in the Coleman case, *supra*, pointed out that the word "punishable" and not the word "punished" was used. He pointed out

this distinction as to phraseology not as the sole or the main ground of the decision that jurisdiction of the military tribunals was concurrent only, but merely as one of many reasons for so holding; and in the same opinion the court announced the following principle:

> "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect."

The use of the word "punished" instead of "punishable" is not made for the first time in the revisions of 1913 and 1916. Congress used the word "punished" in the 62nd Article of War, which was construed in *Ex parte Mason,* (105 U. S. 696). In that case the Court said:

> "The choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the civil and the military law."

In *Grafton vs. United States* (206 U. S. 333) the Court again construed the 62nd Article of War. The Court says:

> "The 62d article provides that the offender, when convicted, shall be *punished* at the discretion of the court. * * * *
>
> "While, however, the jurisdiction of general courts-martial extends to all crimes, not

> capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts." (Italics supplied.)

The 62d Article of War was again construed in *Franklin vs. United States* (216 U. S. 556) where the Court uses the following language:

> "It is well settled that the 62d article of war does not vest, nor purport to vest, exclusive jurisdiction in courts-martial, and that civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished by a court-martial under the provisions of that article. * * *
>
> "Undoubtedly the general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial."

In each of the three cases last cited the Article of War under consideration used the word "punished" instead of the word "punishable," and in each case it is declared that the legislation does not have the effect of excluding the jurisdiction of civil tribunals.

The use of the expression "shall be punished as a court-martial may direct" in Article 93 could not, we submit, be held to exclude the jurisdiction of civil courts, for the reason that Article 74, which constitutes a part of the same body of articles, expressly recognizes such jurisdiction by making it the duty of the commanding officer to deliver the soldier to the civil authorities for trial in time of peace. 74th Article of War, Act

August 29th, 1916, c. 418, Sec. 3, 39 Stat. *United States ex rel Drury vs. Lewis*, 129 Fed. 826, affirmed 200 U. S. 1. Congress could not in a section consisting of a single sentence have used the words "shall be punished" in two different and conflicting senses, the one sense to be assigned in time of war and the other in time of peace. Since Congress shows that the words were intended, so far as affects crimes committed in time of peace, to refer to a concurrent jurisdiction, it must follow that, in respect to offenses committed in time of war, Congress meant the words to have the same definition and sense.

If Article 93 does not confer upon courts-martial exclusive jurisdiction of offenses not capital, then it is submitted, Article 92 could not confer such exclusive jurisdiction in the case of capital offenses. The words "shall suffer death" could have no more efficacy to accomplish this purpose than the words "shall be punished," or "shall be punished by the infliction of the death penalty."

Indeed, it is submitted, there is no reasonable rule of construction under which a statute providing that an offense shall be punished by a court-martial could be held to evince an intention to exclude concurrent jurisdiction of other tribunals. It would be carrying literalism to preposterous lengths to hold that the statute imposes upon the court-martial an unalterable mandate to punish the offense in any event and regardless of any other considerations, and, therefore, that the necessity for executing this mandate excludes the existence of a concurrent jurisdiction in the civil tribunals. It could as well be argued that the statute imposes upon the court-martial the duty to punish in spite of a prior ac-

quittal or in spite of the absence of admissible evidence, or without the necessity for a charge having been preferred. The legislative intent expressed in the Article, of course, pre-supposed that the court-martial would punish only in the event it had properly assumed jurisdiction, and upon legal evidence and proper procedure. These things were taken for granted, just as it was also taken for granted that the court-martial would not punish if the offender was not before it, but was being tried by a civil tribunal without objection or interference on the part of the military authorities.

A familiar illustration of this proposition is found in the various state statutes prohibiting misdemeanors. The language generally used is that the defendant shall be punished as the court or jury may decide. The use of the words "shall be punished" does not exclude the concurrent jurisdiction of the courts of municipalities to punish the same act as an offense against a municipal ordinance. *Rosencrantz vs. U. S.*, 155 Fed. 38; *Hornstein vs. U. S.*, 155 Fed. 48; *Fox vs. Ohio*, 4 How. 410, 433; *Cross vs. North Carolina*, 132 N. C., 131, 139.

Even in the case of statutes conferring jurisdiction on civil tribunals, there is a strong presumption against a construction which would give such statute the effect of depriving any other court of its existing jurisdiction.

> "When a court has jurisdiction of a crime, a statute which merely confers the same jurisdiction on another court does not deprive the former court of its jurisdiction, unless there is an express provision or clear implication to that effect." *Rosencrantz vs. U. S.*, 155 Fed. 40.

How much stronger should be the presumption against a result which would withdraw from all civil tribunals the right to punish a large class of offenses against the civil sovereignty, and which, in many cases where a civilian had been wronged and where the civil sovereignty would have a greater interest in the prosecution than the military establishment, would nevertheless substitute proceedings by a committee of army officers, behind doors closed to the public, for that open trial before a jury which the English speaking people regard as the just and proper method of conducting prosecutions in which the whole public has a legitimate interest.

In dealing with the contention that the change to the phrase "shall be punished," in the present Article of War, evidenced an intention to exclude civil jurisdiction, the Supreme Court of California says:

> "We think that, even in the entire absence of other considerations, it would be going far beyond any justifiable limit to conclude that by this mere change of phraseology in a revision of the article more than thirty years after *Coleman vs. Tennessee* was decided, any such radical change was designed." *People vs. Denman*, (Cal.) 177 Pac. 461.

It is further pointed out in the opinion last cited that the change to the words "shall be punished" and "shall suffer death" occurs not in the articles fixing and conferring jurisdiction, but in the articles specifying the offenses and assigning punishment thereto. Says the Court:

"Under the revisions, Articles 92 and 93 like the many other articles defining and specifying offenses and prescribing penalties, are no longer the articles conferring jurisdiction. The matter of jurisdiction is specially covered by articles 12 to 16, under the heading 'Jurisdiction', by which the jurisdiction of the various kinds of courts-martial is specified. Article 12 declares that:

> 'General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles', etc.

"Under the scheme of the revision the office of such articles as 92 and 93 is simply to declare the crimes and offenses punishable by the articles, and to make such provision as was deemed proper for the punishment to be imposed by the court-martial. That article 92 contains an express provision that, as to murder and rape committed in time of peace within a state or the District of Columbia, no person shall be tried by court-martial, does not affect our conclusion as to this. This being the situation, there was no particular significance in the change made in phraseology on which so much reliance is based. Naturally, we look to the articles conferring jurisdiction to ascertain any intent on the part of Congress to make the jurisdiction of courts-martial thereby conferred exclusive, and, certainly, no such intent is to be found in those articles, or, in our judgment, in any part of the articles of war, when the same is considered in connection with the other parts."

It is difficult to conceive of a valid or even plaus-

ible reason why Congress should desire to deprive civil tribunals of jurisdiction over offenses committed by soldiers either in time of peace or of war. As is declared in *Coleman vs. Tennessee, supra,*

> "No public policy would have been subserved by investing them with such jurisdiction, and many reasons may be suggested against it. Persons in the military service could not have been taken from the army by process of the State courts without the consent of the military authorities; and therefore no impairment of its efficiency could arise from the retention of jurisdiction by the State courts to try the offenses. The answer of the military authorities to any such process would have been, 'We are empowered to try and punish the persons who have committed the offenses alleged, and we will see that justice is done in the premises.' Interference with the army would thus have been impossible."

Such an enactment by Congress would be worse than useless; it would, as stated by Mr. Justice Field, justly incur "the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts."

As expressed by Mr. Justice Brown in *United States vs. Clark,* (31 Fed. 711,) such an enactment would compel the abdication of "that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity."

It is difficult to believe that any Congress would enact a statute so useless to accomplish any good purpose and so obnoxious to the feelings and beliefs of the

American people. And even if Congress were to decide upon the enactment of such legislation, it would be almost incredible that when they came to uproot so deep-seated and fundamental a doctrine—when they came to enact legislation revolutionizing the existing and universally accepted rule—they would fail to express their purpose in direct words, and would leave it to be ascertained only by indirect inference and deduction.

So far as we have been able to find from a careful search of the authorities, the question of the exclusiveness *vel non* of military jurisdiction has been passed upon in only three cases construing the present Articles of War. In each of these cases it was held that the civil courts have concurrent jurisdiction with the military tribunals.

People vs. Denman, (Cal.) 177 Pac. 461;
Funk vs. State, (Tex.) 208 S. W. 509;
United States vs. Hirsch, 254 Fed. 109.

Respectfully submitted,

J. Q. SMITH,
NIEL P. STERNE,
BENJAMIN MICOU,

Counsel for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

EDGAR C. CALDWELL, APPELLANT.
v.
W. E. PARKER, SHERIFF OF CALHOUN County, Alabama. } No. 636.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

The United States, through its Solicitor General, and pursuant to leave heretofore granted by this honorable court, submits the following brief of suggestions as *amicus curiae*:

This case is an application for habeas corpus to discharge the prisoner from confinement, on conviction for murder resulting in a death sentence in the courts of Alabama on the ground of a lack of jurisdiction to try the defendant, he being at the time of the offense a soldier of the United States in active service in time of war (R. 3).

After an affirmance of the conviction by the Supreme Court of Alabama, that court granted a rehearing (R. 10).

On this rehearing, by permission of the court, the Attorney General of the United States, as *amicus curiae*, filed a brief calling attention to Article of War 74; but reciting that the military authorities having acquiesced in the State action in trying the accused, the United States felt a duty to intervene to ask the careful scrutiny of the case by the Supreme Court of Alabama, and thereupon urged that the facts of the record could not sustain a conviction of an offense greater than voluntary manslaughter.

On this application for habeas corpus the United States Attorney was also directed to appear and call to the court's attention the views of Judge Cochran in *Ex parte King*, 246 Fed. 868.

At the very outset the United States disavows any desire to interfere with the asserted jurisdiction of the courts of Alabama to try and convict upon the charge of murder, in time of war, a soldier of the United States, if such jurisdiction shall be made to appear, but the views expressed by the United States District Court for the Eastern District of Kentucky in *Ex parte King*, 246 Fed. 868, raise such question as to the correctness of the conclusion of the District Court in this case as to render it the duty of the Government to bring this subject to the attention of this court, to the end that the judgment of death here involved may not be exe-

cuted until the question raised by the opinion in Ex parte King and the different conclusion reached in this case by the court below has been authoritatively settled.

On the question of jurisdiction, Judge Cochran who delivered the opinion in *Ex parte King, supra*, after making reference to *Coleman* v. *Tennessee*, 97 U. S. 509, *Grafton* v. *United States*, 206 U. S. 333, and *Franklin* v. *United States*, 216 U. S. 559, cases wherein this court held the civil and military jurisdiction to be concurrent, states the question raised by him as follows:

> The offenses covered by article 93 are not limited to time of war, as in the former article 58, but the two covered by article 92 are. It will be noted, however, that in neither article is the provision that the offenses covered by them are "punishable" by court-martial; but in article 92 the provision is that the offender "shall suffer death or imprisonment for life as a court-martial may direct," and in article 93 that he "shall be punished as a court-martial may direct." Such language as this Mr. Justice Field in *Coleman* v. *Tennessee* seems to intimate might confer exclusive jurisdiction. It is therefore a question under the existing articles of war whether the military authorities do not in time of war have exclusive jurisdiction of the crime of murder, when committed by a person subject to military law, no matter where he may be when committed.

ARGUMENT.

I.

1. The power of Congress.

As *Coleman* v. *Tennessee*, *supra*, appears to be the genesis, expressly or by implication, of the subsequent cases in which the jurisdiction of civil courts has been held to be concurrent as to offenses triable before courts-martial, it may be helpful to review the whole subject, particularly as the *Coleman case*, *supra*, appears to have been rested upon the peculiar language of the statute there under consideration.

Paragraph 14 of section 8 of Article I of the Constitution provides "The Congress shall have power"—

> To make rules for the government and regulation of the land and naval forces;

That the power of Congress under this provision is plenary, is definitely settled in the *Coleman case*, *supra*, wherein this court said at page 514 of its opinion:

> As Congress is expressly authorized by the Constitution "to raise and support armies," and "to make rules for the government and regulation of the land and naval forces," its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary.

Tarble's case, 13 Wall. 397, 408, thus describes the legislative power:

> Now, among the powers assigned to the National Government, is the power "to raise

and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National Government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.

Not only so, but as this power is conferred in language similar to the commerce and other powers, it is submitted that it should be interpreted by the same rules applied in construing those other powers, viz, that when Congress by its legislation exercises the power, the existing authority of the States, if any, is wholly superseded within the field of operation of the Federal legislation.

In this aspect of the case, if the present statute vests jurisdiction to deal with and punish the soldier

in time of war, does not this cover the field (there being no words of concurrent jurisdiction) and does not the question present itself not as one of conflict between civil and military jurisdiction, but of conflict between State and Federal jurisdiction? Stated differently, and paraphrasing the language of this court in *Western Union Telegraph Company* v. *Boegli*, decided January 12, 1920, have not the Articles of War "deprived the State of all power in the premises," except so far as those articles authorize State action? It would seem to follow upon principle that if the State, as held in the case of Boegli, just cited, may not penalize a telegraph company for misconduct in negligently failing to deliver a telegram because Congress has legislated upon the subject, the State also may not penalize a soldier for his conduct, to wit, murder, because Congress has taken jurisdiction of the subject, defined the offense, the tribunals to try it, and the punishment to be imposed. There seems to be no ground for contending that the legislative constitutional power in the first instance is superior to or more plenary than that existing in the latter case. May Congress control, to the exclusion of the States, the conduct of an interstate carrier, but not the conduct of the soldier?

Should the views herein expressed have merit, then it only remains to ascertain whether Congress has by legislation so covered the field of criminal conduct by soldiers, which is here in question, as to withdraw this class of cases from the operation of the State statutes upon the general subject. We proceed then to examine the Articles of War.

2. The Articles of War Analyzed.

The Articles of War as amended August 29, 1916, are set forth in volume 39, Statutes at Large, page 650 *et seq.*

At the very outset, the statute provides that—

> SEC. 1342. The articles included in this section shall be known as the Articles of War, and shall at all times and in all places govern the Armies of the United States.

Articles 12, 13, and 14 confer upon general, special and summary courts-martial "power to try" the military persons specified therein.

Article 16 declares that "officers shall be triable *only* by general courts-martial."

Article 69 requires the commanding officer to place "in confinement" a "soldier charged with crime or with a serious offence," to the end that he may be tried by court-martial. Article 70.

Article 74 requires *in time of peace* that for offenses "punishable by the laws of the land," committed in the States of the Union or the District of Columbia, the offender shall be delivered over to the "civil authorities" for trial, thus permitting the State jurisdiction to attach. *United States* v. *Clark, 31 Fed.* 710, 711.

For murder *committed in time of war,* which is the case at bar, article 92 provides that the offender "shall suffer death or imprisonment for life as a court-martial may direct."

Does it not follow from the foregoing review, that Congress, in the Articles of War, has taken over the Government and control of the soldier in such manner as to forbid the attaching of State jurisdiction except in time of peace?

Do not these provisions also indicate a purpose to exclude concurrent jurisdiction? In time of peace the jurisdiction of the State is to punish the crime; in time of war, the courts-martial.

Cogency is added to this view by considering the scheme of military law in force at the time the *Coleman* v. *Tennessee* case, *supra*, arose. At that time article 38 of the Articles of War, 2 Stat. 359, 364, required at all times, both in peace and war, the turning over to the civil authorities of the State upon application, of officers and soldiers committing certain described offenses, among which was murder, to the end that they might be tried by the civil authorities. In this situation obviously the 30th section of the act of March 3, 1863, 12 Stat. 736, under review in the Coleman case, could not properly be interpreted as abrogating the above-mentioned article 38, where that article was applicable. But the present Articles of War have, as we have pointed out, demonstrated the clear purpose of Congress, to limit to times of peace, the turning over of soldiers to the civil authorities, and during time of war made provision prescribing the punishment which "shall" be suffered, and the tribunal which shall impose it, viz, the court-martial. Thus the old

articles preserved to the States in peace and in war the right to try soldiers accused of murder, while the new articles with equal emphasis withdraw State jurisdiction during time of war, and confer it exclusively upon courts-martial.

3. Decisions of this Court dealing with subject of jurisdiction of courts-martial.

It is to be observed that while *Coleman* v. *Tennessee*, 97 U. S. 509, under the then existing Federal statutes, as above pointed out, held that State courts had in loyal States concurrent jurisdiction with courts-martial even during the time of war, the exact question was, had the courts of Tennessee such power, and this was decided against the power. The cases of *Grafton* v. *United States*, 206 U. S. 333, 348, and *Franklin* v. *United States*, 216 U. S. 559, were what may be termed peace-time cases. The assertion, therefore, in the opinions in those cases that the civil jurisdiction is concurrent with that of courts-martial, may well be taken to refer to peace times, particularly in view of the permissive civil jurisdiction now recognized in article 74, *supra*, of the Articles of War, and the following excerpt from *Drury* v. *Lewis*, 200 U. S. 1, 7:

> The general jurisdiction in time of peace of the civil courts of a State over persons in the military service of the United States, who are accused of a capital crime or of any offense against the person of a citizen, committed within the State, is, of course, not denied.

See also—

Arver v. *United States*, 245 U. S. 366, 377, 382, 388.

Ex parte Foley, 243 Fed. 470, 474.

In re Wulzen, 235 Fed. 362, 367, 369.

Trask v. *Payne*, 43 Barb. (N. Y.), 569, 575.

Ex parte Frederick Bright, 1 Utah, 145, 154, 155.

Finally, as stated by this court in *In re Grimley*, 137 U. S. 147, 152:

> By enlistment the citizen becomes a soldier. His relations to the State and to the public are changed.

II.

These suggestions are respectfully submitted in the hope that they may be of service in resolving the important question presented by this case.

ALEXANDER C. KING,
Solicitor General.

H. S. RIDGELY,
Attorney.

FEBRUARY, 1920.

○

CALDWELL *v.* PARKER, SHERIFF OF CALHOUN COUNTY, ALABAMA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 636. Argued March 4, 5, 1920.—Decided April 19, 1920.

The jurisdiction to try and punish for the crime of murder, committed by a person in the federal military service upon a civilian while the nation is at war, but in a place within the jurisdiction of a State where hostilities are not present and where martial law has not been proclaimed, is not vested exclusively in a military court-martial by the Articles of War of 1916; and conviction and sentence of a soldier, in such circumstances, in the state court, are not void. So *held*, where no demand for the culprit had been made upon the State by the military authorities. P. 355.

Affirmed.

THE case is stated in the opinion.

Mr. Henry E. Davis and *Mr. Charles D. Kline*, with whom *Mr. James A. Cobb* was on the brief, for appellant:

Comparing former Article 58, Rev. Stats., § 1342, with present Article 92, it is first particularly to be noted that, whereas the former used the expression that the offenses therein mentioned "shall be punishable" (of which language as used in the Enrolment Act of March 3, 1863, this court in *Coleman* v. *Tennessee*, 97 U. S. 509, remarked: "It simply declares that the offences shall be 'punishable,' not that they shall be punished by the military courts; and this is merely saying that they may be thus punished") the present Article 92 distinctly provides that "any *person* subject to military law who commits" either crime in the Article mentioned, of which murder is one, "*shall suffer* death or imprisonment for life, *as a court-martial may direct.*" The difference in language between the two sections, old and new, cannot be regarded as accidental and must be regarded as industrious. As Congress is to be presumed to have had in mind the language of this court in the *Coleman Case*, this conclusion is inevitable. Congress, instead of providing that the offenses mentioned should be "punishable," intended that the offender should suffer the prescribed penalty, to be inflicted by the designated tribunal, namely, a court-martial.

By existing Article 74 it is required of the commanding officer, and of him only, upon application of the civil authorities, and upon such application only, to deliver to the latter, or to aid in apprehending or securing for the latter, for trial, a soldier accused of crime, except one who is at the time held by the military authorities as prescribed, and also, "*except in time of war;*" and the penalty incurrable by the commanding officer who upon such application refuses or wilfully neglects to do as required is

to be visited upon him only *in time of peace*. Again, whereas present Article 92 provides that a soldier committing murder shall suffer the prescribed penalty by sentence of a court-martial, it further provides that no soldier accused of such offense shall be tried by that tribunal if the offense be committed "*in time of peace*." If, therefore, these Articles are so to be read as to give effect to each and all of their provisions, they mean this: that in time of peace a soldier charged with murder must be tried by the civil authorities and cannot be tried by the military, but that in time of war the military authority over the soldier is primary, paramount and exclusive.

From another viewpoint this conclusion seems equally unavoidable. The citizen—by which is meant *every* citizen—is under obligation to national military service, and the right of the nation to require such service is paramount; the army of which the citizen becomes a member is a body of men whose business is war, and what is more, the body which the nation has formed and is using as its instrumentality to carry on war; and so impossible is it to say that the services of *every* citizen capable of bearing arms may not become indispensable for the defense of the country, that it follows as a corollary that *every* citizen must be kept in a situation and condition to render those services at any and every moment of his time.

When, therefore, the citizen becomes a member of the army in time of war, he is, for the time being and for the purposes of the services due by and required of him, withdrawn from civil life and transferred to a separate and distinct realm, namely, the realm of military life. He ceases for the time being to be of the civil citizenry and becomes a member of the military citizenry, and is subject accordingly to the laws and regulations governing the latter and not to those governing the former: all this, of course, during a state of war. And if this be so, no civil authority may for the time being lay hand upon him

because of any act for which, except for his temporary condition, he would have been amenable to the civil law and its authorities.

The language of this court in the *Coleman Case* respecting the exclusiveness, or the contrary, of the jurisdiction of the military tribunal under the section of the Enrollment Act under consideration is plainly *obiter dictum*, and should therefore not be, and is not, controlling.

The cases of *Ex parte Mason*, 105 U. S. 696; *Grafton* v. *United States*, 206 U. S. 333, and *Franklin* v. *United States*, 216 U. S. 559, arose in time of peace, and under the former, and not the present, Articles of War; and the language of the court in each of those cases is to be restricted in application accordingly. [Counsel also cited *Tennessee* v. *Hibdom*, 23 Fed. Rep. 795; *Ex parte King*, 246 Fed. Rep. 868; and *Kepner* v. *United States*, 195 U. S. 100, 128.]

In the judgment now under review it is recited that there is no averment in the petition that the military authorities at any time demanded the surrender of the petitioner. Of this it ought to suffice to say that the failure of those authorities to put their jurisdiction in play cannot be said to cancel or abrogate it.

Nor would the case be affected if the fact were that any one in military authority had delivered the petitioner to the civil authorities for trial: as respects this, it suffices to say that no one in military authority has any right so to do; that no one but the commanding officer is charged with the duty of delivering an accused soldier to the civil authorities, and that in time of war that obligation is not even on him.

Mr. J. Q. Smith, Attorney General of the State of Alabama, and *Mr. Niel P. Sterne*, with whom *Mr. Benjamin Micou* was on the brief, for appellee.

The Solicitor General and *Mr. H. S. Ridgely*, by leave of court, filed a brief as *amici curiæ*, in behalf of the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Pending the existence of a state of war with Germany the appellant, a soldier in the Army of the United States serving in a camp in Alabama, was tried and convicted for the murder of a civilian at a place within the jurisdiction of the State and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. The conviction was reviewed and affirmed by the Supreme Court of Alabama and was reëxamined and reaffirmed on rehearing.

The case is here to reverse the action of the court below in refusing on writ of habeas corpus a discharge which was prayed on the ground that, under the circumstances stated, the sentence was void because the state court had no jurisdiction whatever over the subject of the commission of the crime, since under the Constitution and laws of the United States that power was exclusively vested in a court-martial.

As there was no demand by the military authorities for the surrender of the accused, what would have been the effect of such a demand, if made, is not before us. The contention of a total absence of jurisdiction in the state court is supported in argument, not only by the appellant, but also by the United States in a brief which it has filed as *amicus curiæ*. These arguments, while differing in forms of expression, rest upon the broad assumption that Congress in reënacting the Articles of War in 1916, by an exercise of constitutional authority, vested in the military courts during a state of war exclusive jurisdiction to try and punish persons in the military service for offenses

committed by them which were violative of the law of the several States. In other words, the proposition is that under the Act of 1916, by mere operation of a declaration of war, the States were completely stripped of authority to try and punish for virtually all offenses against their laws committed by persons in the military service. As in both arguments differences between the provisions of the Act of 1916 and the previous Articles are relied upon to sustain the accomplishment of the result contended for, we must briefly consider the prior Articles before we come to test the correctness of the conclusion sought to be drawn from the Articles of 1916.

The first Articles of War were adopted in 1775. By them the generic power of courts-martial was established as follows:

"L. All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion."

It cannot be disputed that the effect of this grant was to confer upon courts-martial as to offenses inherently military an exclusive authority to try and punish. In so far, however, as acts which were criminal under the state law but which became subject to military authority because they could also appropriately be treated as prejudical to good order and military discipline, a concurrent power necessarily arose, although no provision was made in the Articles regulating its exercise. But this omission was provided for in Article 1 of § X of the revised Articles adopted in 1776, as follows:

"Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or property of the good people

of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

In view of the terms of this Article and the fact that it was drawn from the British Articles, where the supremacy of the civil law had long prevailed, it results that its provisions gave the civil courts, if not a supremacy of jurisdiction, at least a primary power to proceed against military offenders violating the civil law, although the same acts were concurrently within the jurisdiction of the military courts because of their tendency to be prejudicial to good order and military discipline.

And in harmony with this view, the Articles in question were applied up to 1806, in which year they were reënacted without change as Articles 99 and 33 of that revision, and were in force in 1863, in the Enrollment Act of which year, it was provided (Act of March 3, 1863, c. 75, § 30, 12 Stat. 736):

"That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit

rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed."

It is to be observed that by this section there was given to courts-martial, under the conditions mentioned, power to punish for capital crimes, from which their authority had been from 1775 expressly excluded; and power was also given to deal, under the conditions stated and in the manner specified, with other enumerated offenses over which they had not prior to the passage of the act had jurisdiction, presumably because such acts had not in practice been treated as within the grant of authority to deal with them as prejudicial to good order and military discipline.

In 1874, when the Articles of War were revised and reenacted (Rev. Stats., § 1342), the generic grant of power to punish acts prejudicial to good order and military discipline was reëxpressed in Article 62, substantially as it existed from 1775. The provisions of § 30 of the Act of 1863, *supra*, were in so many words made to constitute Article 58; and the duty put upon military officials, to surrender to state officers on demand persons in the military service charged with offenses against the State, was reënacted in Article 59, qualified, however, with the words, "except in time of war." Thus the Articles stood until they were reënacted in the Revision of 1916, as follows:

The general grant of authority as to acts prejudicial to good order and military discipline was reënacted in Article 96, substantially as it had obtained from the beginning. The capital offenses of murder and rape, as enumerated in § 30 of the Act of 1863, were placed in a distinct Article

and power was given to military courts to prosecute and punish them, as follows:

"Art. 92. Murder—Rape.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may (be) direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." (39 Stat. 664.)

The remaining offenses enumerated in the Act of 1863 were placed in a separate Article, as follows:

"Art. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct." (39 Stat. 664.)

And finally, the duty to respond to the demand of the state authorities for the surrender of military offenders against the state criminal laws was reënacted as it had prevailed from the beginning, subject however to express regulations to govern in case of conflict between state and federal authority, and again subject to the qualification, "except in time of war," as first expressed in the Revision of 1874, the Article being as follows:

"Art. 74. Delivery of Offenders to Civil Authorities.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil

authorities, or to aid the officers of justice in apprehending or securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct." (39 Stat. 662.)

Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of the argument that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of state authority and the extraordinary extension of military power upon which the argument rests. This alone might be sufficient to dispose of the subject for, as said in *Coleman* v. *Tennessee*, 97 U. S. 509, 514, "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect." Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted, since the Articles of War, originally adopted in 1775, were, as we have seen, in the very midst of the War for Independence, modified in 1776 to make certain the preservation of the civil power.

But the contention relied upon is directly based upon the words, "except in time of war," as qualifying the duty of the military officers to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, imposed by Article 74, and the grant in Article 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital

crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war. Both these provisions took their origin in the Act of 1863 and were drawn from the terms of that act as reëxpressed in the Revision of 1874. By its very terms, however, the Act of 1863 was wholly foreign to the destruction of state and the enlargement of military power here relied upon. It is true, indeed, that by that act authority was for the first time given, as pointed out in the *Coleman Case*, 97 U. S. 509, 514, to courts-martial or military commissions to deal with capital and other serious crimes punishable under the state law. But the act did not purport to increase the general powers of courts-martial by defining new crimes, or by bringing enumerated offenses within the category of military crimes as defined from the beginning, as we have already pointed out, but, simply contemplated endowing the military authorities with power, not to supplant, but to enforce, the state law. As observed by Winthrop, in his work on Military Law, 2d ed., p. 1033, it was intended to provide, through the military authorities, means of enforcing and punishing crimes against the state law committed by persons in the military service where, as the result of the existence of martial law or of military operations, the courts of the State were not open and military power was therefore needed to enforce the state law. And it was doubtless this purpose indicated by the text, to which we have already called attention, which caused the court in the *Coleman Case* to say that that statute had no application to territory where "the civil courts were open and in the undisturbed exercise of their jurisdiction." (P. 515.)

As in 1866 it was settled in *Ex parte Milligan*, 4 Wall. 2, that a state of war, in the absence of some occasion for the declaration of martial law or conditions consequent on military operations, gave no power to the military authorities where the civil courts were open and capable of per-

forming their duties, to disregard their authority or frustrate the exercise by them of their normal and legitimate jurisdiction, it is indeed open to grave doubt whether it was the purpose of Congress, by the words "except in time of war," or the cognate words which were used with reference to the jurisdiction conferred in capital cases, to do more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified,—a doubt which if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the state courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the Revision of 1874 is considered, since in that revision the Act of 1863 was in terms reënacted and the words "except in time of war," appearing for the first time in Article 59 of that revision, could have been alone intended to qualify the time of war with which the act dealt, that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts.

Into the investigation of the subject of whether it was intended by the provision "except in time of war," contained in the Articles of 1916, to do more than meet the conditions exacted by the actual exigencies of war like those contemplated by the Act of 1863, and which were within the purview of military authority, as pointed out in *Ex parte Milligan*, we do not feel called upon to enter. We say this because even though it be conceded that the purpose of Congress by the Article of 1916, departing from everything which has gone before, was to give to military courts, as the mere result of a state of war, the power to punish as military offenses the crimes specified when committed by those in the military service, such admission is

here negligible because, in that view, the regulations relied upon would do no more than extend the military authority, because of a state of war, to the punishment, as military crimes, of acts criminal under the state law, without the slightest indication of purpose to exclude the jurisdiction of state courts to deal with such acts as offenses against the state law.

And this conclusion harmonizes with the principles of interpretation applied to the Articles of War previous to 1916; *Drury* v. *Lewis*, 200 U. S. 1; *Grafton* v. *United States*, 206 U. S. 333; *Franklin* v. *United States*, 216 U. S. 559; 6 Ops. Atty. Gen. 413; and is, moreover, in accord with the decided cases which have considered the contention of exclusive power in the military courts as resulting from the Articles of 1916 which we have here considered. *People* v. *Denman*, 179 California, 497; *Funk* v. *State*, 208 S. W. Rep. 509; *United States* v. *Hirsch*, 254 Fed. Rep. 109.

It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit and that the court was right in so deciding and hence its judgment must be and it is

Affirmed.